

2013

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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DARTMOUTH-HITCHCOCK CLINIC, ET	*	
AL	*	11-CV-358-SM
v.	*	December 20, 2012
	*	2:10 p.m.
NEW HAMPSHIRE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
COMMISSIONER	*	
	*	
	*	

* * * * *

TRANSCRIPT OF SPECIAL HEARING
BEFORE THE HONORABLE STEVEN J. MCAULIFFE

APPEARANCES:

For the Plaintiff:	William L. Chapman, Esq. Orr & Reno, P.A. W. Scott O'Connell, Esq. Gordon J. MacDonald, Esq. Anthony Galdieri, Esq. Nixon & Peabody, LLP
For the Defendant:	Nancy J. Smith, Esq. Jeanne P. Herrick, Esq. Laura Lombardi, Esq. Office of the Attorney General Civil Bureau
For the Government:	Benjamin L. Berwick, Esq. U.S. Department of Justice
Court Reporter:	Susan M. Bateman, LCR, RPR, CRR Official Court Reporter United States District Court 55 Pleasant Street Concord, NH 03301 (603) 225-1453

1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for
3 consideration a hearing in Dartmouth-Hitchcock Clinic,
4 et al. versus the New Hampshire Department of Health
5 and Human Services, civil case number 11-CV-358-SM.

6 THE COURT: All right. Ms. Smith, you
7 renewed your motion to dismiss, I gather. It wasn't
8 necessarily a motion, but it was a prayer for relief
9 in your memo.

10 MS. SMITH: Yes, and I do acknowledge the
11 Court may want us to just re-file our motion to
12 dismiss because --

13 THE COURT: Well, I was just going to -- if
14 it's acceptable to counsel, I was just going to treat
15 it as a renewed motion.

16 Any problem with that, Mr. O'Connell -- or
17 Mr. Chapman?

18 MR. O'CONNELL: No, your Honor.

19 THE COURT: Okay. All right. Who wants to
20 be heard? Mr. O'Connell.

21 MR. O'CONNELL: Good afternoon, your Honor.

22 THE COURT: Good afternoon.

23 MR. O'CONNELL: Since we were last here on
24 November 1st --

25 THE COURT: You've pretty much done all you

1 can do, haven't you?

2 MR. O'CONNELL: What's that?

3 THE COURT: You've pretty much done all you
4 can do. There's not much left of this case; is there
5 really?

6 MR. O'CONNELL: Oh, there is, actually.
7 There are large chunks. In fact, CMS has acted on
8 certain things and hasn't acted on others. And the
9 things it hasn't acted on are alive and well and
10 require attention by this Court, and I'll break it
11 into the two pieces.

12 The first issue is CMS has passed on the
13 inpatient/outpatient application of the SPAs but made
14 crystal clear that the effective date is November 19,
15 2010.

16 THE COURT: And again, correct me where you
17 think I'm wrong, but my overall perspective on it, as
18 reflected in past orders, is you're hanging by a
19 thread and the thread you're hanging by is to the
20 extent the state took action pursuant to a state
21 statute, or statutes, in contravention of what federal
22 law requires you've got an arguable supremacy clause
23 claim.

24 But the federal government has come back now
25 in a matter within the Secretary's expertise and said

1 whatever the state did with respect to setting
2 Medicaid rates, or enacting reduced rates, whatever
3 they did and why ever they did it is irrelevant to us.
4 We look at the result, and the result is consistent
5 with applicable federal law from our point of view.
6 There is no conflict between whatever state statutes
7 they purportedly acted under and applicable federal
8 law.

9 Now there may be all kinds of arguments about
10 the application of the federal law and the regulations
11 and on and on and on, but that doesn't give rise to a
12 supremacy clause claim, does it?

13 MR. O'CONNELL: Well, it does.

14 THE COURT: How so?

15 MR. O'CONNELL: Well, the first issue is that
16 the state took action without authority, and the
17 analysis you just have provided is premised on CMS
18 approval and that they did action that was lawful and
19 consistent with the requirements of 30(a) and 13(A) of
20 federal law.

21 We've got two years in which the state is
22 trying to administer the rates that are not lawful and
23 not approved, and so at the end of the day they are
24 not in compliance with --

25 THE COURT: You're talking about 2008 to

1 2010?

2 MR. O'CONNELL: That's correct.

3 THE COURT: But isn't the answer to that,
4 yes, the administrative process, the applicable
5 federal statutes and regulations, have a mechanism by
6 which you can adjust those rates, but you don't get an
7 injunction unless you have some cause of action.
8 What's the cause of action?

9 MR. O'CONNELL: Well, because we're
10 essentially going to be arguing the motion to dismiss
11 issues, your Honor, I would turn to my colleague, Mr.
12 MacDonald, to argue. I'm prepared to address the
13 implications of the SPA, but because you're asking
14 different questions, I'll --

15 THE COURT: I mean, the SPAs -- again, to me,
16 the government somewhat answered the question. And
17 the answer is, yes, we are looking at it. In fact,
18 we've looked at it. We've considered it. We've ruled
19 on it. Done. No problem. Am I wrong?

20 MR. MACDONALD: Just on the '08 to '10 issue.
21 Remember we -- just starting at the beginning, we have
22 some counts under 30(a), which as the Court knows is
23 premised on a supremacy clause cause of action, and
24 then we have counts under section 13(A), which as the
25 Court has recognized under First Circuit precedent is

1 supported under a 1983 cause of action.

2 With respect to the '08 to '10 issue, that is
3 a 13(A) issue. That is a failure to give adequate
4 public notice. And CMS has come back and said, yes,
5 plaintiffs, you're right, it was inadequate public
6 notice. They've said that the effective date of those
7 SPAs is November 19, 2010, because of that inadequacy.

8 THE COURT: Now, therefore -- as I read it,
9 therefore, the rates -- according to CMS, the reduced
10 rates from 2008 to 2010 are not consistent with
11 federal law.

12 MR. MACDONALD: Correct.

13 THE COURT: Are not approved.

14 MR. MACDONALD: Correct.

15 THE COURT: You can't charge reduced rates
16 that have not been approved or are not approved.

17 MR. MACDONALD: Correct.

18 THE COURT: Isn't that the end of the matter?

19 MR. MACDONALD: And then because we brought
20 the claim under Section 1983 we can come to this Court
21 and ask for an injunction saying, State, you can't
22 enforce this.

23 THE COURT: I'm not sure why you need an
24 injunction. There's no need for equitable
25 intervention or equitable relief. The law is settled.

1 It's clear. Those rights are not enforceable to the
2 extent CMS has not approved them, but that's a
3 function of the operation of the federal statute and
4 the regulatory scheme. It's not a function of I need
5 a Court to confirm that they're illegal.

6 MR. MACDONALD: Well, I think the
7 conversation would be --

8 THE COURT: And illegal probably overstates
9 it. They're not effective.

10 MR. MACDONALD: They're not effective.

11 THE COURT: By operation of the federal
12 regulatory system they're not effective. You don't
13 get a court injunction to state the obvious.

14 MR. MACDONALD: Well, there are two pieces to
15 that. One is, if the state -- the easy button, if you
16 will, on this issue is if the state is recognizing
17 that the rates are ineffective --

18 THE COURT: But they have no choice to. It's
19 not a question of recognizing it, right? Under
20 operable federal law they cannot enforce rates that
21 are not approved by CMS.

22 MR. MACDONALD: I completely agree with the
23 Court. And the reason why this is a very material
24 issue and why there is a potential for irreparable
25 harm is if the state gets up and says, no, your Honor,

1 we disagree, all of these years are still being cost
2 held. Hospitals have not been fully paid. It is very
3 much an open issue.

4 If the state gets up and says, no, your
5 Honor, you're not right, we can enforce those prior
6 rates, then the hospitals will be irreparably harmed
7 because the state is planning to proceed in enforcing
8 illegal --

9 THE COURT: Well, you know, it strikes me --
10 and don't take anything about this comment, but it
11 strikes me that that's a different case, that that's
12 really not this case.

13 MR. MACDONALD: It's count 6, I believe it
14 is. Section 1983, failure to give adequate notice as
15 to all these rates and --

16 THE COURT: The adequate notice, it seems to
17 me, is a little bit of window dressing because those
18 reduced rates, as I understand it -- and again, not my
19 field -- but those reduced rates, as I understand it,
20 from 2008 to 2010 have not -- have been considered and
21 disapproved by CMS, right?

22 MR. MACDONALD: Yes, your Honor.

23 THE COURT: Okay. So there's not much to
24 talk about, right? The state says -- you say to the
25 state at some point in some process, oh, by the way,

1 you underpaid us and we would like to be made whole.
2 I assume you submit a bill and they pay you or you
3 withhold payment from them that you owe them or
4 something. There's an offset -- there's got to be an
5 offset reconciliation process.

6 MR. MACDONALD: Except the differential here
7 is 33 percent.

8 THE COURT: Yeah.

9 MR. MACDONALD: Your Honor, I will sit down
10 on this issue if we hear from the state that they're
11 going to recognize those rates. I think you're
12 absolutely right.

13 But if the state takes the position that
14 they're not going to recognize what CMS has done, then
15 I do think we have a case and I think it's pled in our
16 case.

17 THE COURT: Okay. Fair point.

18 Attorney Smith, you can't charge reduced
19 rates that haven't been approved and in fact have been
20 disapproved by CMS, right?

21 MS. SMITH: Well, they haven't been
22 disapproved. We disagree with what Attorney Gordon
23 says. As CMS acknowledged in what it filed, the
24 approved methodology that was in effect in 2008 on its
25 face appeared to allow the state to adjust the rates

1 and --

2 THE COURT: Why am I wrong? I thought CMS
3 said we've looked at that SPA and we've approved it
4 back to 2010. It's not approved back to 2008. And in
5 order to reduce the rates you have to have CMS
6 approval. 33 percent is a material change. You have
7 to ask for their approval. You have to get their
8 approval. Absent their approval, it's not effective.
9 What am I missing?

10 MS. SMITH: The approved State Plan
11 methodology allowed the state to adjust the rates.
12 There were --

13 THE COURT: You mean without putting in a
14 SPA?

15 MS. SMITH: Yes.

16 THE COURT: Then why did you put one in?

17 MS. SMITH: There was one put in in 2010
18 which addressed other changes in the rate methodology,
19 and because CMS looking at those provisions and the
20 direction that regulation has gone wants more
21 specificity in the State Plan they asked us to
22 specify -- to be more specific about the methodology
23 and ultimately to add the specific rates that were
24 historical rates that were being used.

25 So when they approved 2010 SPAs -- when you

1 look at those approval letters they acknowledge that
2 they are approving the currently existing rates. They
3 did not say that those rates were ineffective or
4 disapproved going backwards. They acknowledge that
5 they were approving rates that were currently in use.

6 THE COURT: That makes no sense to me. I
7 don't even know what you said.

8 Did you seek approval for the rate reductions
9 from 2008 forward?

10 MS. SMITH: There was -- those rates have
11 been approved in the 2010 SPAs.

12 THE COURT: No, no, because that's only
13 approved as of 2010. So what have you got to show an
14 approval for the rate reduction from 2008 to 2010?
15 What have you got? It sounds like you've got an I
16 don't have to do that kind of argument. Is that it?

17 MS. SMITH: If the method was within the
18 existing methodology, it's our position that the State
19 Plan --

20 THE COURT: It isn't. It isn't within the
21 existing methodology. But who decides that? The
22 Secretary decides that basically. Did the Secretary
23 decide that?

24 MS. SMITH: The Secretary has never told us
25 if we had to file a State Plan for the 2008 rates.

1 THE COURT: What was the Secretary looking
2 at?

3 MS. SMITH: The Secretary -- for instance, in
4 some of the other evidence that has been submitted in
5 2008 the hospital association wrote the Secretary
6 asking the Secretary if the state was required to
7 submit a State Plan for these 2008 rate changes, and
8 the answer was very equivocal and the state submitted
9 a response to the Secretary explaining why we did not
10 feel a State Plan is necessary. And so the Secretary
11 was well aware that these changes had been made in
12 2008, and there was no instruction to the state to do
13 a State Plan Amendment specifically regarding these
14 rate changes.

15 If you would like me to find those exhibits,
16 I can --

17 THE COURT: These are the same rate changes
18 that go from 2010 forward as well.

19 MS. SMITH: I'm sorry. I didn't hear you.

20 THE COURT: The same rate reductions
21 from 2010.

22 MS. SMITH: The same rates have continued in
23 effect under the 2008 SPAs that are now -- the 2010
24 SPAs that are now approved.

25 THE COURT: Okay. So you filed a SPA

1 application with respect to this 33 percent reduction
2 in 2010?

3 MS. SMITH: The State Plan Amendments says
4 the 33 percent and the inpatient 10 percent were filed
5 and are SPAs 2010-011 and 2010-014.

6 THE COURT: And that sought approval for
7 reduced rates beginning when?

8 MS. SMITH: They sought approval for other
9 changes in the inpatient methodology and the
10 outpatient methodology. CMS in looking at those
11 provisions said, State, your prior methodology which
12 allows you to make changes under a very vague standard
13 is not sufficiently comprehensive. You need to
14 specify your methodology more specifically. And as
15 those discussions progressed over a number of years
16 they actually increased the request to ask that
17 specific current rates be put into the State Plan. So
18 those are now part of SPA 2010-011 and 2010-014.

19 THE COURT: So you think the Secretary has
20 dropped the ball.

21 MS. SMITH: No.

22 THE COURT: The Secretary has not looked at
23 the 2008-2010 rate reductions with a view towards did
24 you have to file a SPA, was it approvable, so on and
25 so forth, did you publicly notice it.

1 MS. SMITH: The data that we supplied that
2 they specifically have relied on provided metrics to
3 show access from 2007 through the current time. So we
4 have provided data to demonstrate compliance with the
5 federal law from 2007 through the current time, so
6 we --

7 THE COURT: Why does the Secretary say it's
8 approved as of 2010 but not before?

9 MS. SMITH: Because the date of the notice of
10 those SPAs under federal law cannot be effective prior
11 to the first day of the quarter in which the SPA
12 was --

13 THE COURT: So you're in the same position
14 you've been all along. We don't have to do that. We
15 didn't do it. We don't have to do it.

16 MS. SMITH: Correct.

17 THE COURT: That's your position.

18 MS. SMITH: Correct.

19 THE COURT: That we did it, whatever, but we
20 didn't have to.

21 MS. SMITH: Correct.

22 THE COURT: Okay. That doesn't strike me as
23 correct. Did not the injunction on the 13(A) --
24 didn't that -- did that injunction not cover these
25 changes?

1 MS. SMITH: It did. And we gave the notice.
2 That was the notice. But we didn't do another SPA as
3 a result of giving that notice because we were already
4 talking to CMS about putting those same rates in the
5 2010 SPAs. So they were already in SPAs that were in
6 progress in the --

7 THE COURT: No, no. Because you said the
8 2008 to '10 reduction as for those years was not in
9 the SPA. Your position on that is we don't have to.

10 MS. SMITH: We can't -- there's no mechanism
11 by which we can ask CMS to go back and approve it
12 backwards. There's just no mechanism, your Honor.

13 THE COURT: Well, you can't just unlawfully
14 reduce rates, let time go by, file a SPA in futuro and
15 then say the Secretary doesn't have any authority to
16 look backward and decide whether or not we acted
17 lawfully because there's no mechanism. That's not the
18 law? Otherwise why would a state like New Hampshire
19 ever file a SPA request?

20 If CMS made you do it, you might file one,
21 but then for the past five years when the chase was on
22 you would say, well, at least for those five years
23 that's the way it goes. There's no reconciliation of
24 what's legitimate. That can't be right.

25 MS. SMITH: The mechanism that the federal

1 government has is they can withhold funds for a time
2 period in which they feel that you were not in
3 compliance.

4 THE COURT: Well, again, this is going to be
5 more complicated than I thought, I guess.

6 Starting out, do you claim that with respect
7 to -- you know, as I see it, the 2008-2010 issue is
8 about all that's left in this case, I suppose, but I
9 don't even see it as an issue. But maybe you're
10 right. Maybe it is.

11 Did you give 13(A) public notice with respect
12 to the 2008-2010 period with regard to rate reduction?

13 MS. SMITH: We contend that we did and what
14 we --

15 THE COURT: Okay. Let's get the fundamentals
16 first. You say you did. Okay.

17 MS. SMITH: The plaintiff I'm sure will
18 disagree, but these were not in specific documents
19 that we submitted. But public notice and actual
20 notice to the hospitals was given prior to those rate
21 reductions, at the time of those rate reductions, and
22 very shortly thereafter. There are at least eight
23 documents that have been previously filed with this
24 Court that demonstrate that.

25 THE COURT: I guess I was thinking in

1 response to the injunction.

2 MS. SMITH: Yes, in response to the
3 injunction and in response to -- and at the
4 preliminary injunction hearing.

5 THE COURT: I'm not as persuaded as the
6 Secretary about this legislative -- this committee
7 meeting notice, people's notice thing, so I'm not
8 talking about that. I'm talking about you were
9 enjoined and said, look, you can give public notice
10 under section 13(A) with respect to all these rate
11 reductions. I assume you did that.

12 MS. SMITH: I'm sorry. I'm not understanding
13 your question.

14 THE COURT: Well, I issued an injunction and
15 I said the state -- it's been established that the
16 state, they've established a likelihood of success in
17 proving that you did not comply with your section
18 13(A) requirements, so comply. Do it. I assume you
19 did it.

20 MS. SMITH: Yes.

21 THE COURT: And I assume that covered all of
22 the rate reductions that are at issue in this case.

23 MS. SMITH: Yes.

24 THE COURT: Okay. So that's done.

25 MS. SMITH: Yes.

1 THE COURT: Now, is it part of this case that
2 you cannot reduce the rates for 2008-2010 the way you
3 did?

4 MS. SMITH: It's not before this Court
5 because this Court can only issue prospective relief.
6 They are asking you to issue declaratory relief or an
7 injunction --

8 THE COURT: I can do that, but prospectively
9 reconcile the accounts properly.

10 MS. SMITH: And you can't do that for a
11 couple of -- there's some case law that says that
12 that's not proper. Let me just cite a couple of cases
13 for you.

14 One of them is the circuit court case in
15 Wisconsin Hospital Association versus Reivitz which --
16 actually, they gave you one of the district court
17 cases the plaintiff cites. That case is 820 F.2d 863.
18 It is from the Seventh Circuit. In that case the
19 Court said that -- the Court noted that: Any fear
20 that the state has that the hospitals might take the
21 district court's declaration and use it to obtain a
22 damage award in state court doesn't have any basis
23 because the federal court bars -- the Eleventh
24 Amendment bars the federal court from issuing
25 declarations usable only to obtain a damage judgment

1 by a state in a state court.

2 What they were trying to do there was get the
3 Court to -- they were arguing that because the
4 payments that they were talking about had not been
5 finally settled, just like the plaintiffs here are,
6 that therefore the Court could issue an injunction
7 that would be prospective, and the district court --

8 THE COURT: Are these payments in your view
9 finally settled, the 2008 to 2010?

10 MS. SMITH: Inpatient is absolutely settled.
11 To the extent they say otherwise, they're wrong.
12 There's no cost settlement principles regarding
13 inpatient.

14 On the outpatient settlement the rates have
15 been paid for all of these years. The only thing that
16 is outstanding is there is a -- because our formula
17 depends on Medicare allowable rates the federal
18 government hasn't allowed the Medicare fiscal
19 intermediary to close the final audits for these
20 years.

21 So if the Medicare fiscal intermediary comes
22 back and says we're going to allow X which previously
23 wasn't allowed, then we'll have to go -- then the
24 state's rate might need to be adjusted just by what
25 Medicare is now allowing to be included. But that's

1 the only reason anything is conceivably open on any of
2 these years.

3 THE COURT: Okay. Meaning that you've -- the
4 possibles and everything are signed off on these
5 years.

6 MS. SMITH: They have received -- they
7 received -- the way that -- as soon as they do their
8 billing they receive an initial interim payment. Our
9 intermediary has calculated -- after that we get
10 actual costs. So the actual costs have gone into the
11 formula, there have been estimates made on those, and
12 my understanding is that the settlement payments have
13 been made based on those adjustments based on actual
14 costs for these years.

15 But to go back to this case, the Seventh
16 Circuit absolutely said that this reading -- this
17 argument presented that just because something isn't
18 finally settled -- where what they're trying to do
19 would require the state to go back and pay money on
20 services already rendered is an incorrect reading of
21 the word prospective relief, and it's really very much
22 in line with what they're arguing here.

23 Additionally, the Court relied on a United
24 States Supreme Court case, which is Green versus
25 Mansour, that is 474 U.S. 64, which held that federal

1 courts cannot retroactively issue a declaratory
2 judgment that would require a state to go back and pay
3 on prior services or to issue a declaratory judgment
4 that state officials violated federal law in the past,
5 and that's what they're asking you to do.

6 So we think that the -- as far as the newness
7 issues regarding the 2008 rates, the state has
8 complied with the Court's injunction order. CMS has
9 found there was adequate notice of those 2008 rates
10 incorporated into the 2010 notices regarding those
11 SPAs and approved those rates.

12 THE COURT: But how can that be? I mean, how
13 can there be adequate notice of those rate changes
14 when you say we don't have to give notice of those
15 rate changes, we don't have to file a SPA with regard
16 to those changes, they fit with the approved
17 methodology, there's nothing to talk about? How does
18 that square?

19 MS. SMITH: Because the 2010 SPAs gave notice
20 that there were going to be changes in the payment
21 methodology. And CMS's view, as they articulated in
22 their view, is that the notice doesn't have to reach
23 the level of specificity that the plaintiffs suggest
24 it does. It doesn't have to incorporate a specific
25 percentage or a specific dollar in the notice. That's

1 what CMS has told the Court. And I believe in their
2 issues brief is the Secretary's interpretation of the
3 level of specificity required by the public notice
4 process.

5 THE COURT: You seem to be saying the
6 Secretary has said in English, we don't like your
7 formula, it's too vague and too subject to
8 misapplication, tighten it up.

9 You said, okay, we'll tighten it up. We'll
10 tighten it up like this. The Secretary said, yeah,
11 okay. That's good. That's approved back to 2010.

12 And then you say, whatever, it's the same
13 methodology. Whether we tightened it up or didn't
14 tighten it up, there's no substantive change. We
15 didn't have to do that, but we accommodated the
16 Secretary and so everything is good from 2008 forward.
17 That's your position?

18 MS. SMITH: In part. I would just add to it
19 that the exact same methodology has been on the table
20 back in 2008.

21 THE COURT: Well, that's my point. You're
22 saying nothing has changed. They wanted us to put
23 some more bells and whistles on it. We did. But the
24 formula is the same.

25 MS. SMITH: Correct.

1 THE COURT: Okay. Go ahead.

2 MR. MACDONALD: Your Honor, I think you're
3 understanding the issue, and unfortunately --

4 THE COURT: Well, I'm not because I've still
5 got this big issue about what cause of action do you
6 have.

7 MR. MACDONALD: But this is all 1983 land.

8 THE COURT: But it's got nothing to do with
9 13(A).

10 MR. MACDONALD: Yes, it does.

11 THE COURT: Why?

12 MR. MACDONALD: Because the Secretary found
13 that there was inadequate public notice, and on
14 that -- until November 2010, and that's the basis for
15 the effective date. And your Honor is exactly right
16 that the rates before that date are illegal. And
17 unfortunately what we've heard is the state intends to
18 pay on the illegal rates.

19 Now this is not some ministerial settlement
20 process. This is a process where CFOs of hospital --
21 and if you want to hear testimony, we've got several
22 here -- CFOs of hospitals get a worksheet and the
23 worksheet basically says, here are our costs
24 multiplied by 54.04 percent. Please accept this.

25 How can they sign that? It's an illegal

1 rate. It should be 82 percent, the rate before the 33
2 percent cut. And these settlements are very much
3 open. The state has pushed off and pushed off and
4 pushed off settling these claims because they don't
5 want to pay us the money, even the meager 54 percent.
6 This is a very material event.

7 Now, in terms of prospective relief, you
8 know, I will acknowledge there is a Wisconsin case,
9 there's a case in the Second Circuit, there's a case
10 in the Ninth Circuit. This is different. CMS has
11 said unequivocally that these rates are illegal.

12 You have a brief on page 21 -- a statement of
13 interest from the United States saying we don't object
14 to entry of injunctive relief as to those effective
15 dates. And, again, the easy button in this is for the
16 state just to agree that from 2008 to 2010 the rates
17 are not -- you know, they cannot enforce the illegal
18 rates.

19 If they were just to say that today, we could
20 save everyone a lot of time. It's unfortunate that
21 they're not saying that, and frankly, your Honor, I
22 mean there's absolutely no basis in law, but, you
23 know, for obvious reasons we're going to press that
24 issue. I mean, we've got now CMS with us on that
25 issue.

1 MR. BERWICK: Your Honor, my name is Ben
2 Berwick. I'm here on behalf of the United States. If
3 you would like to hear from me, I don't think either
4 side has quite accurately represented the Secretary's
5 view in this matter.

6 THE COURT: Yeah, I would, Mr. Berwick.
7 Thank you. I had a little trouble understanding what
8 you're referring to, too, because, again from my
9 perspective, I really thought I cured all the 13(A)
10 problems with the injunction that required public
11 notice.

12 MR. BERWICK: Well, your Honor --

13 THE COURT: To the extent you can cure
14 anything. I mean, I think I recognize in the order
15 it's kind of after-the-fact relief, but at least it
16 obtains compliance with the requirement that they give
17 public notice.

18 MR. BERWICK: Let me say a couple of things.
19 First of all, the Secretary -- the only thing the
20 Secretary determined was the rates as to 2010. The
21 only State Plan Amendments before the Secretary --
22 other than the pending State Plan Amendments, but the
23 State Plan Amendments the Secretary decided pertained
24 only to 2010.

25 The Secretary made no determination as to

1 whether the state had provided adequate notice or had
2 not provided adequate notice prior to 2010. That's
3 because there was no State Plan Amendment before the
4 Secretary that was relevant to that time period.

5 In fact, the Secretary had no retroactive
6 enforcement ability, so there was no reason for the
7 Secretary to determine whether the state had been in
8 compliance with the notice requirement between 2008
9 and 2010.

10 So to the extent that the plaintiff suggests
11 that the Secretary had made a determination that the
12 state was out of compliance with the notice
13 requirement during that time period, that's not
14 accurate. But the Secretary also had not made a
15 determination that the state was in compliance during
16 that time period either.

17 MR. MACDONALD: May I, just on that point,
18 because that's just not right. The state has
19 submitted a State Plan Amendment, 06-008, and CMS
20 said, you cannot use that because there was no public
21 notice. So there was a pending State Plan they tried
22 to tag this onto.

23 MR. BERWICK: I can address that point if you
24 would like me to, your Honor.

25 THE COURT: Yes.

1 MR. BERWICK: You are correct partially in
2 what you say, which is when that State Plan Amendment,
3 06-008 was initially submitted to the Secretary, the
4 Secretary -- it had an effective date of 2006. The
5 Secretary asked the state to provide evidence of
6 public notice back to 2006. The state did not provide
7 such evidence and withdrew that portion of the State
8 Plan Amendment.

9 THE COURT: Which portion?

10 MR. BERWICK: The portion that changed the
11 methodology that calculated the base rate.

12 But to be clear, that was in 2006 and the
13 Secretary made no determination about whether there
14 was public notice or not. The state withdrew that
15 portion of the State Plan Amendment.

16 So again, it is accurate to say the Secretary
17 has not made a determination as to whether the state
18 was in or out of compliance with the notice
19 requirement prior to 2010.

20 That being said, the Secretary agrees with
21 the plaintiffs to the extent that if the Court finds
22 that the state was out of compliance with section
23 13(A) during that time period, 2008-2010, and all of
24 the other elements of injunctive relief are met, then
25 the Secretary would not object to injunctive relief

1 during and before that time period.

2 THE COURT: What would that injunctive relief
3 look like? I've already issued injunctive relief that
4 said comply with your obligations to provide a public
5 process. The state says, okay, we did. Now what? Do
6 it again?

7 MR. BERWICK: What I would say to that is if
8 the state had not adequately met the requirements of
9 13(A) for that time period --

10 THE COURT: I've already determined that the
11 plaintiffs had a likelihood of success in establishing
12 that the state did not meet its 13(A) obligations with
13 respect to these reduced rates. Period. Relief. Do
14 it. Response: I think we did it. Where does that
15 leave us?

16 MR. BERWICK: All I would say, your Honor,
17 for that time period -- if that is what the Court
18 finds -- and again --

19 THE COURT: No, I already did.

20 MR. BERWICK: Okay. Assuming that's this
21 Court's finding, then the state would be out of
22 compliance with federal law for that time period.

23 THE COURT: Until they comply with the notice
24 requirements, which they did. And now the plaintiffs
25 are saying, and you seem to be agreeing -- I'm not

1 trying to hold your feet to the fire. I'm just trying
2 to find out. The plaintiffs now are saying, yes,
3 great job, Judge, that's wonderful. Now what's the
4 ramification of that? The ramification is for that
5 period of 2008 to 2010 they reduced rates. They
6 didn't give adequate public notice. We think they
7 should have filed a SPA as well, but whatever, but at
8 least we know they were not in compliance with their
9 13(A) obligations. Accordingly, please enjoin them
10 from enforcing those rates from 2008 to 2010 because
11 the Secretary hasn't approved them and they're
12 unlawful because they were not properly noticed. Do I
13 do that?

14 MR. BERWICK: Well, it is certainly the
15 Secretary's position that the Court is free to do
16 that.

17 THE COURT: And you don't see that as a
18 primary jurisdiction invasion?

19 MR. BERWICK: No.

20 THE COURT: You don't see that as a
21 usurpation of a congressionally delegated authority of
22 the Secretary to administer the program?

23 MR. BERWICK: No, your Honor, we don't.

24 THE COURT: Okay.

25 MR. BERWICK: To the extent that the Court is

1 acting on its conclusion that the state was in
2 violation of section 13(A).

3 THE COURT: Correct.

4 MR. BERWICK: Yes; that's correct. We do not
5 believe we have --

6 THE COURT: Again, in general -- again, I'm
7 not trying to hold you to anything, but in general the
8 Secretary's view is there is no private cause of
9 action to enforce 30(a) rights.

10 MR. BERWICK: That is correct.

11 THE COURT: Who knows whether you have a
12 supremacy clause claim or not. The Supreme Court will
13 figure that out someday, maybe. You do have a 13(A)
14 claim, however.

15 MR. BERWICK: Yes.

16 THE COURT: And adequate relief from a 13(A)
17 claim would involve enjoining the state from enforcing
18 rates unlawfully adopted.

19 MR. BERWICK: I think that's accurate, your
20 Honor.

21 THE COURT: Okay.

22 MS. SMITH: In addition to the argument --

23 THE COURT: You've got a problem then, don't
24 you?

25 MS. SMITH: -- that the Court doesn't have

1 authority to go back and order retrospective relief --

2 THE COURT: I'm not sure it's retrospective
3 relief. Why would it be retrospective? State, in the
4 future do not attempt to enforce these illegal rates
5 with respect to 2008 to 2010.

6 MS. SMITH: Because it's regarding services
7 that have been rendered in the past that would require
8 payment on damages -- and it's squarely within
9 obtaining an injunction or declaratory relief in order
10 to allow the plaintiffs to obtain damages because
11 these rates have already been paid.

12 THE COURT: But they're unlawful rates. If
13 we pay these illegal rates, we're good. It doesn't
14 work that way, does it?

15 MS. SMITH: Well, it's not within -- there is
16 an issue regarding the Court's jurisdiction, and the
17 Supreme Court has said in Green versus Mansour
18 that the Court --

19 THE COURT: What's the state's view, we stole
20 it fair and square and we're not giving it back?

21 MS. SMITH: The cases that we have already
22 cited say that --

23 THE COURT: But what's your view?

24 MS. SMITH: On the notice issue, that notice
25 can be cured, that actual notice counts, and that the

1 notice requirements of 13(A) are not rigid and
2 therefore whether or not an injunction would be
3 appropriate, even if it was going forward, needs to be
4 flexible and look at what actually happened.

5 We didn't brief that here in response to this
6 issue regarding primary jurisdiction because that's
7 what we understood the focus of this hearing to be.

8 If you would like additional briefing on that
9 and on the Court's authority regarding specifically
10 the 2008 to 2010 period, we would be happy to do that.

11 THE COURT: I think you might have to.
12 You're right, the Secretary has responded and said,
13 look, here is my view, this is basically within my
14 primary jurisdiction to administer and enforce these
15 regulatory and statutory requirements. I've done
16 that. I think in my view that pretty much ends the
17 matter.

18 But the Secretary steps up and says, now as
19 to 13(A) there's a private right of action, and if the
20 state hasn't complied with 13(A) there's no problem
21 from our perspective in terms of the Court entering
22 appropriate injunctive relief. And they imply we
23 don't think they did a very good job in terms of
24 meeting their obligations under 13(A) with respect to
25 these years of rate reduction.

1 So then the answer is, okay, well, what's the
2 relief? I've already granted some relief, which is go
3 do it. But you seem to be saying, okay, having done
4 it -- having done it, there's no recoupment. We still
5 get to impose unlawful rates.

6 I guess I'm hung up there. Why do you get to
7 do that? Because the Secretary doesn't care? The
8 Secretary says, well, I care, but from our perspective
9 we don't have retroactive enforcement authority. My
10 authority is limited to taking away your money or not
11 taking it away.

12 So how does that work out? It seems to me
13 that the hospitals have a legitimate claim. How does
14 it work out?

15 MS. SMITH: We would also renew our latches
16 argument. The hospitals if they think they haven't
17 gotten notice can't sit on that for three years
18 because that's something that could be cured.

19 They didn't bring this until 2011, and they
20 can't sit on this and now go back and --

21 THE COURT: But your real argument is the
22 only relief available is an injunction requiring that
23 the notice requirements be adhered to. Isn't that
24 your real argument? Your argument is there is no
25 equitable relief that can reach back and resettle the

1 rate.

2 MS. SMITH: Correct.

3 THE COURT: Okay.

4 MS. SMITH: If you want -- there were some
5 issues that the plaintiffs raised about the 2011 SPAs
6 being still pending. I can address that if you want.

7 THE COURT: Well, I think -- doesn't that fit
8 in the category of it's within the jurisdiction of the
9 Secretary? She's exercising her discretion and
10 jurisdiction to resolve those matters, and when she
11 does if you don't like it there's an APA remedy
12 available to you. Isn't that the end of that? Mr.
13 MacDonald.

14 MS. SMITH: Just to address some inaccuracies
15 in what the plaintiff said, those SPAs are pending.
16 There is a clock ticking regarding the 2011 SPAs.

17 THE COURT: Again, I tried to make it clear.
18 It's a question of primary jurisdiction, it seems to
19 me, and my concern was is anybody looking at this.
20 And the answer seems to be, yes, we are looking at it
21 and we've looked at it and we've ruled, to the extent
22 we're going to rule, except we've got other rulings
23 coming, but now there's this little sort of fill up
24 until about 2008-2010.

25 Go ahead, Mr. MacDonald.

1 MR. MACDONALD: May I?

2 THE COURT: Please.

3 MR. MACDONALD: Just on this 2008-2010 issue.

4 It's just very unfortunate that the state is going to
5 put us all through this when the easy answer is simply
6 to acknowledge the rates --

7 THE COURT: They're not giving you the money
8 back if that's what you're talking about.

9 MR. MACDONALD: No. They have tomorrow,
10 today, that they can fix the problem.

11 THE COURT: But they're not going to.
12 They're not going to. And they're saying there's
13 nothing you can do about it because there's no
14 jurisdiction to go back and award damages against the
15 state. There's no jurisdiction to give prospective
16 relief that's really retroactive relief. There's no
17 way that you can enjoin us from paying rates we've
18 already paid and settled. That's their argument.

19 MR. MACDONALD: The Court clearly has
20 jurisdiction to give prospective relief.

21 THE COURT: But not in the nature of there's
22 really a mass retroactive relief in the nature of
23 damages. That's what you want. You want the money
24 back.

25 MR. MACDONALD: We want to get paid.

1 THE COURT: Or you want the money you were
2 supposed to get.

3 MR. MACDONALD: We want to get paid on what
4 has now on December 13th been determined to be a legal
5 rate, not an illegal rate as CMS has determined.

6 In other words, on December 13, 2012, CMS
7 says from November 19, 2010 forward these rates are
8 illegal. We have not been paid for those years.

9 THE COURT: I'm sorry. Say that again.

10 MR. MACDONALD: Last Friday CMS approved
11 these SPAs. And the effect on the outpatient rates
12 is -- they're saying from November 19, 2010 forward
13 the rates are legal.

14 Now, footnote there. We respectfully suggest
15 they got that wrong because the Court -- as you've
16 observed several times, the first notice of any of
17 this was after the Court issued its injunction. The
18 real date should be March 30, 2012. We are saying --

19 THE COURT: But what does that say about 2008
20 to 2010? And what Ms. Smith is saying, I think, is,
21 A, it doesn't say anything; and B, CMS has not said
22 that the 2008 to 2010 rates are illegal in any way.
23 They haven't approved it. They haven't disapproved
24 it. They don't need to approve it or disapprove it
25 because those reductions were set in accordance with

1 the methodology that was in place and part of the
2 State Plan. That's our argument. We're sticking to
3 it, and there's nothing the Secretary said that in any
4 way undermines that argument.

5 MR. MACDONALD: Well, they can -- I mean
6 that's been their mantra.

7 THE COURT: Yeah, but what have you got other
8 than, well, but they've said this is effective back to
9 November 2010, and therego, everything before that
10 must have been determined to be illegal, but the
11 Secretary didn't say anything like that.

12 MR. MACDONALD: I've got letters from CMS
13 saying that the methodology as existed was inadequate.
14 They needed to change the methodology. And to change
15 the methodology you need to do a public notice.
16 That's what CMS said and that's why they had to change
17 that page. CMS said, okay, you need a public notice,
18 and they were able to grab onto this one in 2010 and
19 say that's adequate. That's what happened.

20 The correspondence from CMS is pretty clear
21 about -- they needed to change the methodology. It
22 was insufficient. They said it granted the state too
23 much discretion. Our argument from day one. You
24 couldn't look at that methodology and figure out
25 anything. It needs to be reasonably clear to

1 providers and beneficiaries. They could do whatever
2 they wanted.

3 THE COURT: Just by way of testing your
4 argument, why wouldn't the easy response be, they may
5 have thought it was inadequate after a period of time
6 of seeing the way we implemented it, but whatever,
7 that was the approved methodology and we did apply it.
8 And did we abuse the discretion when we snuck into
9 ourselves when we wrote this standard? I guess we
10 did. Did we get caught? I guess we did. But you
11 know what, that was the approved methodology. There
12 was nothing unlawful about it. We applied these rate
13 reductions according to the methodology. We agree we
14 wrote it to our own benefit and we exploited it fairly
15 well, but that doesn't make it unlawful.

16 MR. MACDONALD: Again, I mean it's Groundhog
17 Day in this case, but the approved methodology dating
18 back to 1995 was pay Medicare rates. That's the
19 approved methodology.

20 And they have this convoluted interpretation
21 about how they can get away with making across the
22 board cuts. And CMS said, no, that's not a
23 methodology. It's way out of date. You need to get
24 it updated every 20 years or so, and that's why they
25 made them make these changes. And they're saying the

1 changes -- the actual rates that are now baked into
2 the State Plan can only be effective from November 10,
3 2010 onwards.

4 And so we've got these very real pending
5 settlements, and these CFOs are going to have to sign
6 and certify to the state that, yeah, 54.04 percent is
7 the rate. It's not. That is not the rate under the
8 approved State Plan. It would be a hundred percent of
9 whatever Medicare pays, and I can tell you that they
10 would be more than happy to take that. That's the
11 issue.

12 THE COURT: How do you enforce that?

13 MR. MACDONALD: Court to state --

14 THE COURT: Just don't be too wedded to this
15 particular case. They send you a check and it's based
16 on a rate that's not compliant with the methodology.
17 All would agree it's not. And they say, too bad, take
18 it, that's it.

19 MR. MACDONALD: And that's part of the
20 concern, your Honor.

21 THE COURT: How do you go about enforcing
22 that right to get the rate that's been set?

23 MR. MACDONALD: Well, it's actually --

24 THE COURT: You have to go to the Secretary
25 first, right?

1 MR. MACDONALD: No, you don't. Because the
2 Secretary is saying she's got very -- I think we hear
3 that the Secretary has very limited enforcement powers
4 in this area. She has basically two meanings to
5 enforce conduct that she's concerned about with the
6 state.

7 One is to cut off all funding, and that's
8 obviously a sledge hammer. And the second is -- I'm
9 drawing a blank. There's one other.

10 THE COURT: Well, I don't agree that it's
11 that limited, but the Secretary can certainly say to
12 the state, hey, you've got to file a State Plan
13 Amendment here and if you don't those rates aren't
14 lawful. And then if they say, well, we're not going
15 to, then you're going to have to come to federal court
16 and say I would like an injunction to keep them from
17 enforcing these rates until such time as they comply
18 with federal law. The Secretary then says, yeah,
19 that's not an invasion of my primary jurisdiction
20 because I agree the law requires them to file a State
21 Plan Amendment and they haven't done it. I think
22 that's what he's saying is, you want to enjoin that,
23 absolutely, go ahead and enjoin it, but we're so far
24 down the road in this case because you've already
25 gotten a partial remedy, which is go ahead and comply

1 with your notice requirements. They say, okay, we've
2 done it.

3 Now you seem to be coming back and saying,
4 oh, and also under 13(A) enjoin the enforcement of
5 those rates.

6 MR. MACDONALD: Enjoin the settlement process
7 so we don't have to agree that 54.04 percent is
8 somehow a lawful rate. Some CFO is going to submit
9 that, put his signature on it? I mean -- and they're
10 going to be put in that position of having to do that,
11 and that's the process.

12 CMS had said the rates were fine from
13 November 10 forward. Okay. But we've got this
14 problem. They want to enforce the illegal rates. And
15 I would just -- well, anyway, just to move on to the
16 30(a) issue.

17 THE COURT: 30(a)?

18 MR. MACDONALD: Yeah. I just want to respond
19 to Attorney Smith's argument.

20 MR. CHAPMAN: I was just going to say, your
21 Honor -- maybe I'm missing something here, but if I
22 understand Attorney MacDonald we've got CFOs, or CEOs,
23 who have been given a document by the state that has
24 rates that were not approved by CMS at least prior to
25 November of 2010, and I'll come back to that in a

1 minute.

2 THE COURT: That's debatable.

3 MR. CHAPMAN: And they are being requested to
4 sign off on this.

5 Now, you've heard that if CMS has not
6 approved the rates until at least, at the earliest,
7 November of 2010, then can't you issue an injunction
8 against the state trying to make these CEOs sign off
9 on this document because the document has rates that
10 are not effective? You said it in the first couple of
11 minutes they're not illegal. They're just not
12 effective. They weren't approved by CMS.

13 THE COURT: Well, I think that's -- isn't
14 that the debatable proposition? The state's
15 contention is there's no annual blessing of rates or
16 reductions. We set rates according to methodologies
17 approved by the Secretary. We did that. We did that.

18 MR. CHAPMAN: I thought their position was we
19 didn't have to submit a SPA, and that was a good part
20 of the argument at the January hearing.

21 THE COURT: Right.

22 MR. CHAPMAN: Finally there was enough back
23 and forth between the state and CMS that led to this
24 dribbling out of back and forth that ultimately
25 resulted in something that CMS could approve last

1 Friday.

2 Then they said, well, when was notice of this
3 given, and they're taking a very, very liberal view of
4 notice in the document that they refer to in their
5 memo that certainly doesn't comply with any fair
6 reading of 13(A), and so they say November.

7 But I thought you said based on a hearing in
8 January of 2012, and everything you heard, as of that
9 date the state had not given adequate notice of all
10 the rates at issue, and give notice. And that was
11 your order on March 2, and notice was given on March
12 30th. I don't see how these rates could be effective
13 any time earlier than that.

14 THE COURT: Because -- and it's just the
15 argument, but the argument is because the rates were
16 set according to an approved methodology. The
17 Secretary has not disapproved those rates. We didn't
18 file a SPA request because we weren't changing the
19 methodology, didn't have to. And that the Secretary
20 subsequently said we want you to clarify this, put in
21 a SPA and make it more clear, we did that. That was
22 made retroactively approved to November of 2010.

23 But that action says nothing about the rates
24 set before 2010. It doesn't say anything about it,
25 right?

1 MR. CHAPMAN: Well, I thought the
2 representation today from the U.S. Attorney was we
3 never looked before 2010. So we were looking at a
4 record as of 2010.

5 THE COURT: Because that's when they filed
6 the SPA and they're limited to considering the SPA
7 when the SPA is filed, what it is, and it can only be
8 retroactive to the beginning of the quarter in which
9 it was filed.

10 So from their administrative point of view,
11 okay, now we have a SPA. Now we know how to deal with
12 this. We put it in the machine and put in a plug and
13 out comes an answer. But nobody put in a SPA before
14 2010, and the state's view of that is we didn't have
15 to. Nobody said we did. You don't have a private
16 right of action to enforce section 30(a). Why are we
17 here? I think that's their position.

18 See, you've got to have a cause of action.
19 It's not just I think they've misapplied the
20 regulations and the law and I think they've turned the
21 crank backwards and I think they got the wrong
22 effective date. All of that is very interesting, but
23 it's got nothing to with a federal cause of action.

24 MR. CHAPMAN: But doesn't 13(A) give us a
25 caution of action?

1 THE COURT: 13(A) gives you a cause of
2 action, and you've gotten relief and the relief is
3 give the notice for whatever it's worth, and they're
4 given the notice.

5 Now it seems like you're shifting gears quite
6 a bit and saying, well, as part of that relief now we
7 want an injunction that prohibits them from enforcing
8 rate reductions determined according to the
9 methodology that was in place from 2008 to 2010 -- and
10 we could all fill in the narrative -- because of all
11 of these problems based upon the failure to give
12 notice. The idea being you didn't give notice. The
13 rate reductions are therefore illegal. They are not
14 enforceable. That's where we are.

15 MR. CHAPMAN: A pretty simple proposition,
16 isn't it? I mean, it makes common sense.

17 THE COURT: Only if there was a material
18 change in the application of the methodology, only if
19 they were required to do it, and only if the Court had
20 the equitable power to issue injunctive relief that in
21 effect is a damages award, which is what they're
22 suggesting. And Mr. MacDonald concedes that there's
23 some law out there that suggests that you can't do
24 that. And she's throwing in latches and all kinds of
25 other arguments, too, which suggest that -- is

1 threatening a trial on the merits, it sounds to me
2 like.

3 MR. CHAPMAN: Well, I'm assuming something,
4 but I thought when you came out today your position
5 was the rates were ineffective between 2008 and 2010.

6 THE COURT: My assumption from reading the
7 government's brief was that the rate reductions from
8 2008-2010 were not lawful and unenforceable. But what
9 I hear the government's attorney saying is, we don't
10 know, we haven't said that, haven't thought about it,
11 don't have a position. They're saying, if you think
12 so, go ahead, issue some relief, we don't care, as
13 long as it's 13(A), not 30(a). Is that pretty much
14 what you're saying?

15 MR. BERWICK: That's accurate, your Honor.

16 THE COURT: That's what he's saying. That
17 clouds it a bit, because that's not the same as the
18 Secretary has said these rates were illegal. That's
19 different. Of course the Secretary seems to be
20 saying, had I said that, I wouldn't do anything about
21 it because I don't have any retroactive enforcement
22 authority. So again, it leaves you high and dry
23 still.

24 So I guess it's starting to narrow down to
25 what have you got left? You've got a 13(A) claim on

1 the 2008, 2010 rates; is that what we're talking
2 about?

3 MR. O'CONNELL: Well, a footnote, your Honor,
4 if I may go to the notice that you ordered, and that
5 was only done in March of this past year.

6 THE COURT: Well, but again, the Secretary
7 has approved -- the problem you're facing there is the
8 Secretary has within her jurisdiction approved
9 rates -- these rate reductions back to November.
10 That's the end of that matter. If you don't like
11 that, that's an Administrative Procedures Act appeal.

12 MR. O'CONNELL: We only mention it as a
13 reference issue, your Honor. It's a footnote. But
14 the real issue is, as has been argued, that 2008 rate
15 changes cannot be married out with a 1997 plan in any
16 way, shape or form, and you heard a lot of testimony
17 about that almost a year ago.

18 So we've heard argument that somehow that
19 methodology was baked in there, but I would ask as
20 part of your consideration that you look at that
21 and --

22 THE COURT: What's the relief? You're
23 obviously going to have to brief it, but give me an
24 idea what the relief is that you're looking for.
25 What's its shape?

1 MR. O'CONNELL: Yeah, I will address that
2 right now, your Honor.

3 We understand the Eleventh Amendment
4 consideration that the state has raised, and as a
5 result we would ask this Court to enjoin Commissioner
6 Toumpas from finalizing this settlement. Why?
7 Because if they are finalized -- if the CFOs that are
8 in this room have to sign the bottom line, and if we
9 run over to state court for some type of damage
10 relief, they will be forced to reckon with accord and
11 satisfaction, release and waiver.

12 THE COURT: Is there some regulatory
13 imperative that they sign this by a certain time or
14 something?

15 MR. O'CONNELL: Well, we have looked in vain
16 for a process or a procedure. We are told the way
17 it's administered is once they're tendered the final
18 reconciliation from the commissioner the commissioner
19 tells them they have 60 days to respond. We can find
20 no regulation that that's tied to, but that is
21 apparently the way the commissioner enforces this
22 right.

23 So the bottom line is tomorrow they could be
24 tendered 2008 rates -- reconciliations based on
25 illegal rates and told they've got 60 days to accept

1 or not, and in that same time period --

2 THE COURT: Say they don't accept. What's
3 the ramification?

4 MR. O'CONNELL: Well, they get no money and
5 then they've got to seek legal redress.

6 THE COURT: They've been paid those rates
7 already, haven't they?

8 MR. O'CONNELL: They've been paid 54 percent,
9 but they would have no way of compelling with the
10 commissioner as to any established process we've been
11 able to determine. So we'll have to seek a damage
12 remedy in another forum.

13 But in the intervening time period while
14 we've been here for almost 18 months the irreparable
15 harm is mounting, and the truth is it would be highly
16 improper for the commissioner to make these people
17 sign on the dotted line that could have legal
18 consequences.

19 THE COURT: You're out of the irreparable
20 harm business.

21 MR. O'CONNELL: Not entirely, your Honor,
22 because -- I mean, I understand you're saying if
23 there's a damage claim there's no irreparable harm.

24 THE COURT: No, I'm saying the Secretary has
25 approved these reduced rates.

1 MR. O'CONNELL: Not for 2008 to 2010.

2 THE COURT: Well, the irreparable harm in
3 terms of this is going to destroy the hospitals and
4 make medical care unavailable to Medicaid patients and
5 so forth and that's irreparable harm -- I mean, the
6 Secretary has taken that way from you. So now all you
7 have is a vote with your feet, you know, you've got to
8 vote with your feet. That's all you can do in terms
9 of the system as it's currently structured. You
10 either play or you don't. It's up to you. It's
11 voluntary.

12 So all you have left now, as I read from your
13 pleading, was we've got this claim about 2008-2010. I
14 will concede my view of that was, well, of course
15 they're going to stick you with a reduced rate for
16 those two years because it wasn't done properly. But
17 now they're back to the old, oh, sure it was, which I
18 think requires a hearing on the -- a trial on the
19 merits to determine.

20 But in the back of my mind I'm still
21 thinking, but what's the remedy, what's the remedy? I
22 can't award damages against the state.

23 MR. O'CONNELL: I agree with that. Unless
24 it's prospective. And there is this issue as to
25 whether or not by issuing an injunction today

1 stops the finalization in the future that ultimately
2 touches --

3 THE COURT: What does that do for you? If I
4 enjoin the finalization and say, okay, you know what,
5 take that finalization box, put it over in that
6 corner, and twenty years from now somebody will go and
7 look at it. It doesn't affect you.

8 MR. O'CONNELL: Yeah, it does. It helps us
9 enormously. It stops the state from enforcing an
10 illegal or an improper rate, or an ineffective rate,
11 pick your favorite adjective. No authority to enforce
12 it.

13 And it allows us in the intervening time
14 period -- now that we've got clarity from the
15 Secretary as to what the effective date was -- to seek
16 some type of breach of contract claim. But in the
17 intervening time period if the commissioner says sign
18 this, then it becomes waiver, then it becomes accord
19 and satisfaction, and then it becomes an estoppel.

20 The easy button is for the state to say we're
21 not going to do that, but they're not telling me that,
22 which is why we will have irreparable harm. They will
23 be waiving rights.

24 And you're right, you can't give damages to
25 these individuals because of the Eleventh Amendment,

1 but that doesn't mean we're without remedy because of
2 the intervening circumstances in this cases, because
3 of the recent action of CMS, and because we now know
4 there is this gap between 2008 and November of 2010
5 where the state can point to no authority that says
6 these were approved.

7 The only authority they can point to is what
8 Mr. MacDonald says; a 1997 SPA that says pay
9 mandatary, and they're not doing that. They've never
10 done that in this decade.

11 So they have a big problem, your Honor. The
12 arguments you have heard that this is approved is just
13 sophistry. The 83 percent that they're paying is
14 sophistry. That's not approved. It's Medicare.
15 That's what the State Plan says.

16 So at the end of the day we've got a state
17 actor, 1983 land, engaging in action without color of
18 law that's causing harm to these actors.

19 Now, what can you do about that? You can
20 give prospective relief. For 2008 and 2010 that's
21 highly limited. It has to do with these
22 reconciliations that we've been talking about.

23 Can you award money from the Treasury of New
24 Hampshire? Probably not. Even if it's prospective in
25 the circumstances of this case. There are times when

1 it's appropriate, but in the circumstances of this
2 case authority is against us in some respects. It's
3 not decided in the First Circuit. It will be an
4 interesting legal argument if it gets that far.

5 But that aside, what can you do? You can
6 stop him from taking action that will cause
7 irreparable harm and hurt any damage claim they have
8 across the street. That can be done now, and in the
9 circumstances of this case should be done because it
10 would stop a state actor from doing something without
11 authority, and that's 1983.

12 The proposed order that we've attached to our
13 filing yesterday is exactly that narrow. It says stop
14 him from taking action to finalize those open years.
15 Just stop it dead in its tracks. And then it's up to
16 these clients to figure out what they can do with
17 that. Is that helpful? You bet it is. You bet it
18 is.

19 I mean, we thought it would be over with the
20 action of CMS. Unfortunately, it's not, so we have to
21 go vindicate this right in a forum that's going to
22 somehow turn it to money for these parties. But in
23 the interim he should be stopped from taking any
24 improper action.

25 The second issue -- and I know 30(a) is not

1 high on your list today, but let me simply make the
2 following observations. It's in our papers, so I will
3 highlight them generally speaking.

4 This Court heard argument and testimony --
5 which the Secretary has not heard -- four days in
6 January of this year identifying access limitations.

7 Now, the SPAs that have been approved quite
8 unequivocally -- notwithstanding what the state says
9 they submitted -- quite unequivocally say that the
10 Secretary only looked at data for 2010 and there was
11 no access issue.

12 Well, of course there was no access issue.
13 There was UPL and there was DSH then. There was more
14 than \$130 million more money in the hands of these
15 parties. Of course there's no access issue.

16 THE COURT: Well, again, it's not my place to
17 sit and second-guess CMS's assessment of the
18 situation. I agree with you. I read their decisions,
19 and what they seem to be saying is you've got to go
20 out there and create a train wreck and then we'll
21 address it. But until you create a train wreck, until
22 there's no access, until people are being denied
23 coverage, until we're satisfied that hospitals and
24 providers are not providing services, until that
25 happens we aren't going to require that the rates go

1 up.

2 MR. O'CONNELL: That may be --

3 THE COURT: And as of right now the Secretary
4 says I'm happy that things are fine, these rates are
5 fine. Now, whether they're fine or not, that's her
6 call. It's not a Court's call.

7 MR. O'CONNELL: Well, let me respectfully
8 offer the following observation.

9 As primary jurisdiction principles would
10 apply, it is her call in the first instance. These
11 SPAs have been pending for a long time. You heard
12 testimony almost a year ago on the access issues in
13 2012. Those SPAs have not been acted upon. Those
14 SPAs which deal with UPL -- by the way, I should note,
15 your Honor, there was a question in a footnote in your
16 March order as to UPL's rates. You will read these
17 CMS letters and you will see that Director Mann looks
18 at UPL contents and rates and does a 30(a) analysis.

19 So at the end of the day we await guidance
20 from CMS as to whether or not those reductions that
21 have already been implemented but not approved are
22 creating a 30(a) access issue. Okay. Under primary
23 jurisdiction she gets some latitude from a Court to
24 make a pass on that, but we are going to be more than
25 a year for this Court's perception on that.

1 THE COURT: No, I think you're wrong about
2 that. It's more than that. Once the decision is made
3 it's an APA review. That's the way it is.

4 MR. O'CONNELL: Well, your Honor, you
5 remarked during our last hearing that the MO has been
6 the SPA gets filed and notice issues are addressed,
7 there's a request for additional information, and that
8 can gets kicked down the road sometimes for years.

9 The people who suffer are the beneficiaries
10 that these clients are serving. At the end of the day
11 I would submit that you have a role to act when it
12 reaches an intolerable point. A year sitting on
13 evidence of access issues is a reasonable time for the
14 Secretary to act, we would submit.

15 THE COURT: I hear you, but I think that's an
16 argument you've got to make to Congress or the
17 Secretary and it's not an argument you can make to the
18 Court. There's got to be a cause of action.
19 Supremacy clause is all you have when it comes to the
20 merits of those decisions, and you don't have that
21 unless you have a statute that's inconsistent and
22 they've acted under it. You don't have that unless
23 the Secretary decides it's consistent with federal
24 law. You may disagree, a lot of people may disagree,
25 but it's her call. If you don't like that call,

1 there's an Administrative Procedures Act remedy that
2 you can follow and you have to follow.

3 So we're stuck here with, unfortunately, the
4 Secretary said I'm not that much interested in
5 preserving any jurisdiction with respect to 13(A).

6 So the real question is, is it not, what are
7 the facts? Was notice required? I suppose. Was
8 notice given? And the answer is, you know, in all
9 likelihood, yes, notice was required. No, notice was
10 not given, but what's the remedy that you're entitled
11 to in terms of those two years? Isn't that really
12 what we're here for?

13 MR. O'CONNELL: Stop the enforcement of
14 illegal rates is what we've asked.

15 THE COURT: Doesn't that require a hearing on
16 the merits to determine what the facts really are as
17 opposed to, well, we've had an injunction hearing, I
18 suppose; we got preliminary injunctive relief, I
19 suppose?

20 MR. O'CONNELL: Exactly. And we would ask
21 that you take the evidence that you've heard and
22 decide that -- and the developments from CMS and
23 determine that indeed the state's position is not
24 based on solid proof and --

25 THE COURT: I think I remember Justice Kagan

1 in the Douglas case asking the question, and so
2 Ms. Smith I'll ask of you. Why wouldn't I enter an
3 injunction and just say, you know, until you get
4 Secretarial approval for those rates for 2008-2010
5 you're enjoined, you can't enforce them? Go ahead and
6 get Secretarial approval if you want, but until you do
7 you can't enforce them.

8 MS. SMITH: We can have a trial if the Court
9 wants to, but I think that --

10 THE COURT: No, but why couldn't I not simply
11 say that? Say, look, based upon what I've heard
12 that's a material change. It's required a SPA. You
13 didn't file one. It's a 13(A) issue because you
14 didn't give adequate notice with respect to 13(A).
15 Until you file a SPA and get approval you're enjoined.

16 Because the notice thing seems to me a little
17 silly. Why don't you just let us give notice because
18 it has no consequence because the Secretary is not
19 going to review 2008-2010 because you haven't put in a
20 SPA. And if you do put in a SPA the retroactive date
21 now is not going to be anywhere near 2008-2010.
22 There's no review. There's no opportunity or means
23 for review of 2008-2010 by the Secretary.

24 MS. SMITH: Your Honor, I'm sorry. I lost
25 the Court.

1 THE COURT: There's no -- how can the
2 Secretary pass on the legitimacy of the rates for
3 2008-2010? How could that happen? You could file a
4 SPA but --

5 MS. SMITH: I don't think that there is a
6 mechanism for the Secretary to do that.

7 THE COURT: You think there is?

8 MS. SMITH: I do not.

9 THE COURT: Yeah. Well, that's my problem.
10 That's their problem.

11 MS. SMITH: There is not a mechanism for this
12 Court to order us to go back and do something
13 different than what we did under the approved
14 methodology.

15 THE COURT: I think in large measure you're
16 probably right. To the extent these rates don't meet
17 30(a), that's outside my bailiwick. But to the extent
18 you didn't give adequate notice, that's not outside
19 my bailiwick.

20 So we're really talking about scope of relief
21 related to failure to give adequate notice. And what
22 they're suggesting is, well, that relief can include
23 do not enforce those rates until such time as they are
24 approved.

25 Now, if you want to go get them approved, go

1 ahead. If you don't, whatever. But until you get
2 them approved don't try to enforce them.

3 MS. SMITH: That can't be the relief for a
4 13(A) notice because there's no mechanism for us to go
5 back and get them approved.

6 THE COURT: It's going to be yours or it's
7 going to be the hospital's.

8 MS. SMITH: I mean, we haven't briefed this
9 because this just got filed. They just filed these
10 papers last night at 6:30.

11 THE COURT: Right.

12 MS. SMITH: In the case that I cited to you,
13 the Wisconsin case, which is 820 F.2d 863, that's
14 exactly what the plaintiff there was trying to get the
15 Court to do.

16 The Court said: The hospitals argue that
17 because no final settling up for the year has been
18 made the judgment they seek is prospective only. A
19 direction for the defendants to ignore the rate that
20 was set and go back to paying the prior rate.

21 But the Court said: This is a misuse of the
22 word prospective. And the Court went on and said that
23 what he needs -- and what Mr. O'Connell and Mr. Gordon
24 both told you they need is they want payment, and here
25 it is sought from the state. That's pecuniary. It

1 impacts the State Treasury, and it's a type of relief
2 that's retrospective and it's beyond the ability of
3 this Court to issue an injunction for it.

4 THE COURT: They could bring a contract
5 action against the state in state court certainly,
6 couldn't they? Couldn't they bring a contract action
7 against the state in state court and seek the damages?

8 MS. SMITH: In other contexts based on other
9 fact patterns there have been some cases in state
10 court that have sought to say that you're not paying
11 us at the proper rate. That's what Attorney O'Connell
12 was referring to, that they may try to bring it --
13 maintain a contract action in the state court.

14 In Green versus Mansour, the United States
15 Supreme Court case that I cited, as well as this
16 Wisconsin case, specifically held that you can't get
17 declaratory relief from the federal court just to
18 enable a plaintiff to go maintain a state claim. It's
19 an improper use of the declaratory relief power of the
20 federal court.

21 MR. O'CONNELL: We take the point that
22 there's an Eleventh Amendment issue. What we're
23 asking for is not what the state is trying to dress up
24 as a straw man. We're saying stop the commissioner
25 from any action right now, no more trying to settle

1 this, and let us go across the street, if necessary,
2 to state court without these CFOs being compelled to
3 sign on the dotted line and cause a release, an
4 ovation, an accord and satisfaction or something of
5 legal consequence as to their rights, and let us do
6 that.

7 This Court now knows -- and just
8 parenthetically -- I mean, the whose ox is being gored
9 comment is something that the Secretary has
10 acknowledged. In her pleading she says: To be sure,
11 a state that chooses to implement proposed amendments
12 prior to approval does so at the risk that CMS will
13 later disapprove those proposed amendments.

14 THE COURT: That begs the question, what if
15 they never seek it?

16 MR. O'CONNELL: There is that problem, but
17 here we know --

18 THE COURT: If you don't seek it, you don't
19 get the wrong answer. If you don't get the wrong
20 answer, you get to always say it was okay at the time
21 and nobody said differently, which is where you are.

22 MR. O'CONNELL: We are stuck in a situation
23 where they have unilaterally made changes in 2008
24 which are -- if you read the State Plan Amendment --
25 not authorized and not even close, and CMS said this

1 is a problem.

2 THE COURT: But let me just stop you just so
3 we stay somewhat clarified. That doesn't sound like a
4 13(A) argument. That sounds like some other kind of
5 argument. A 13(A) argument is you had an obligation
6 to give proper notice under the statute and you didn't
7 do it.

8 MR. O'CONNELL: Absolutely.

9 THE COURT: It's got nothing to do with you
10 made a material change, you didn't file a SPA. That's
11 all 30(a), and we don't deal with 30(a). So you're
12 stuck with 13(A).

13 MR. O'CONNELL: I understand, your Honor. So
14 let me turn to what should have happened.

15 When the state somehow migrated off of the
16 Medicare requirement -- and we're not sure when it
17 happened -- they should have given notice. They
18 should have given notice.

19 THE COURT: Again, I don't want to be tedious
20 about it, but I really think that I'm focused and have
21 to be focused on one thing: Did they violate 13(A) or
22 did they not violate 13(A) --

23 MR. O'CONNELL: They absolutely did.

24 THE COURT: -- with respect to these rates?
25 They either did or they didn't.

1 MR. O'CONNELL: They did.

2 THE COURT: If they did, what's the remedy?
3 What remedy are you entitled to? Normally the remedy
4 would be go give an adequate notice, but you're asking
5 for a more comprehensive remedy. You're saying, I
6 assume, something like enjoin them from enforcing
7 those rates until what? Until notice is given?

8 MR. O'CONNELL: No. Until the effective
9 date. I mean, at the end of the day you're right to
10 observe that nothing can happen in the Medicaid
11 program unless CMS approves it. That's why effective
12 dates matter. And if the state can't point to an
13 effective date because of deficient notice -- and the
14 Court has already given an order saying this is
15 deficient, at least in your judgment -- then that has
16 consequences and they shouldn't be able to enforce it
17 until after that notice has been provided.

18 THE COURT: Here's a proposition for you.
19 This case is now about the plaintiffs trying to
20 enforce a federal requirement that approval be
21 obtained before material changes are effected in
22 rates.

23 MR. O'CONNELL: Not necessarily. But it's at
24 their risk if they've screwed it up. If they're going
25 to administer to it, they better get those approvals,

1 and they bear the risks. If they didn't --

2 THE COURT: But again, I'm searching for the
3 cause of action. You come through the door and you
4 say I've got a complaint and my complaint is that the
5 state is required by federal law not to reduce rates
6 unless they go through a particular process and they
7 didn't do it, and so therefore I would like you to
8 enjoin them from enforcing those rates.

9 MR. O'CONNELL: Sure. We provided service on
10 the basis that they would follow the law, and they
11 didn't follow the law and they didn't give us notice
12 when they were going to make changes. All the
13 services have, as the state has observed, been
14 provided. And they unilaterally took the money away
15 without giving us an informed process to say don't do
16 that, don't do that, and we spent a lot of time in
17 January arguing the point that that is irreparable
18 harm, and 13(A) requires precisely that type of public
19 process. And I think that in part informed your order
20 which required them to comply and move forward, and
21 there has to be a consequence.

22 THE COURT: Mr. Berwick, do I read your
23 position as being to the extent that notice was
24 required and not given and an action is brought under
25 13(A), any relief under 13(A) that vindicates the

1 notice requirement is not inconsistent with the
2 Secretary's view of her primary jurisdiction?

3 MR. BERWICK: I'm not sure I fully understand
4 the question, your Honor.

5 THE COURT: The claim here -- obviously where
6 they're going is saying, okay -- where I'm going
7 anyway is all you've got is 13(A). That's all you've
8 got, 13(A). So they say, okay, we'll run with 13(A).

9 13(A) premise: 2008-2010 rate reductions
10 were material changes that required a SPA, but more
11 importantly they required notice. Notice was not
12 given. Notice was given later. Whether those rates
13 were approved -- approvable or not -- reductions,
14 whatever, because notice was required -- it's only
15 required if it's a material change. Because notice
16 was required and notice was not given, enjoin the
17 enforcement of those rates.

18 Do I understand the Secretary's position to
19 be, that's fine with me, it doesn't affect my view of
20 my responsibility to administer and enforce the
21 program?

22 MR. BERWICK: That is the Secretary's
23 previous position, your Honor, yes.

24 THE COURT: Okay. And so -- because normally
25 you would think the Secretary would say, no, no, if

1 somebody is going to decide whether something is a
2 material change under a methodology, I'll do that. If
3 somebody is going to decide whether a SPA is required,
4 I'll do that.

5 MR. BERWICK: The problem here, your Honor,
6 is the Secretary doesn't have Kagan to make that
7 determination because there is no State Plan for that
8 period of time and there can't be.

9 THE COURT: Of course. Well, that's the fly
10 in the ointment because the way New Hampshire has
11 operated this thing is, sure, you're going to escape
12 review because you're never going to ask for it.

13 MR. BERWICK: Well, I think that's partially
14 accurate, your Honor. Although to the extent the
15 state did not comply -- accepting the presumption the
16 state did not comply with 13(A) --

17 THE COURT: Well, they did not comply with
18 13(A). The question is did they have to. Well, that
19 begs the following question. I don't know. Is this a
20 material change? They say no. The Secretary says, I
21 don't know, nobody asked me and it's too late now.

22 MR. BERWICK: Well, to that, your Honor, I
23 would say that if the change as the plaintiffs
24 describe it is accurate -- in other words, if there
25 was a reduction of rates in 2008 that did require a

1 State Plan Amendment, to the extent the state did not
2 submit one that was not compliant with federal law.

3 THE COURT: Okay.

4 MR. O'CONNELL: We agree.

5 MR. BERWICK: But I think your Honor is
6 correct to identify the cause of action problem under
7 that scenario, and it seems to me that the only cause
8 of action is under 13(A).

9 THE COURT: It's under 13(A). I agree.

10 MR. MACDONALD: And just on the -- sorry to
11 bounce around. Just on the 30(a) piece, just so we're
12 clear on --

13 THE COURT: You understand there is no 30(a)
14 piece, but go ahead.

15 MR. MACDONALD: Well, I didn't read the
16 United States' statement of interest as suggesting
17 that as to the 2011 SPAs which are now pending that
18 she's asserting primary jurisdiction. I didn't see
19 her saying that. I saw her saying, well, we don't
20 have to talk about that because we think there's no
21 cause of action.

22 And the 2011 claims are very much at issue.
23 That's what you heard evidence on. And CMS hasn't
24 acted and I think they told the Court -- the Secretary
25 told the Court she's not going to tell you whether

1 she's got primary jurisdiction because she doesn't
2 think there's a cause of action.

3 THE COURT: Oh, I think that probably doesn't
4 state it accurately. The Secretary's position is if
5 it's within the delegation by Congress to me the
6 authority to administer and enforce this program, I
7 will do that and please don't get in my way, right?

8 MR. BERWICK: I'm afraid that's not what it
9 is, your Honor. I think plaintiff actually did state
10 our position accurately, which is -- our position is
11 that there is no cause of action under the supremacy
12 clause for section 30(a).

13 But we take no position, your Honor, on the
14 question of whether there is primary jurisdiction --
15 whether the Secretary has primary jurisdiction because
16 we believe there is simply no cause of action section
17 30(a).

18 May I add one other thing, your Honor?

19 THE COURT: Sure.

20 MR. BERWICK: When we filed our statement of
21 interest it was actually on that same day that the
22 state submitted responses to the request for
23 additional information, and so we were actually
24 unaware at the time we filed our statement of interest
25 that those responses had been submitted to the agency.

1 So the 90-day clock is now ticking on the
2 Secretary's action on those pending State Plan
3 Amendments. So the Secretary has to make a
4 determination by March 18, 2013, on those pending
5 State Plan Amendments.

6 THE COURT: Yeah. I think you haven't been
7 involved in this very long, but I think I've already
8 held, or certainly communicated, that there is a
9 supremacy clause cause of action. To the extent that
10 the state took action pursuant to state law that
11 authorized the state to do something that federal law
12 directly contradicts, there is a supremacy clause
13 action. Federal law controls state law. That's
14 basic.

15 The fill up in the problem was what if they
16 took action under state law that authorized them to do
17 something that the federal law would not authorize
18 them to do, but happily it turns out that what they
19 did with all the worst of intents turned out to be
20 consistent with what federal law would require? Is
21 that the case here? I don't know. Who decides that?
22 Well, usually the Secretary decides that when you're
23 talking 30(a), and that's what they were talking
24 about.

25 So now the Secretary has come back and said,

1 what do you know. We don't care what their subjective
2 motivation was in reducing these rates. We don't care
3 that it was strictly budgetary. We don't care. We
4 look at results and we look and see do the results
5 comport with what federal law require, and happily for
6 them they do. Now there's no cause of action under
7 the supremacy clause because there's no conflict.

8 MR. BERWICK: I think that's accurate, your
9 Honor, as to the 2010 State Plan Amendments, but there
10 are pending State Plan Amendments --

11 THE COURT: Sure, but it's the same process.
12 Is there a conflict? Did they do something under
13 state law that conflicts with federal law? They can't
14 do that. But did they? I don't know. Who's going to
15 decide that? The Secretary. If the Secretary decides
16 they did do something that conflicts with federal law,
17 she has remedies, I assume. If she decides they
18 didn't, then there's no supremacy clause cause of
19 action because there's no contradiction.

20 So now we're boiled down to your memo which I
21 read as saying we've resolved pretty much all of this,
22 or we're about to, and there's no cause of action here
23 really under the supremacy clause -- I tend to agree
24 with you -- but those 2008-2010 rates, those are back,
25 and if you want to enjoin those, Judge, under 13(A)

1 because they weren't properly noticed, have at it.
2 It's not going to step on my toes. It's not going to
3 invade my province with respect to administering the
4 system.

5 MR. BERWICK: I think the only thing where we
6 part ways, your Honor, is that the Secretary's view is
7 that -- even as to the pending State Plan Amendments
8 the Secretary has not said yet whether they comply
9 with 30(a) or anything else.

10 THE COURT: I'm satisfied she is going to.

11 MR. BERWICK: She is going to, your Honor,
12 yes.

13 THE COURT: Right. She's going to. So once
14 she does, then there's an APA remedy, if there is one
15 available, or whatever, so it takes it out of that
16 conflict, it seems to me.

17 Okay. Where are we?

18 MR. MACDONALD: I'm sorry. She's going to
19 what?

20 THE COURT: She's going to resolve those.
21 She's going to rule on those rate changes as set out
22 in pending SPAs.

23 MR. MACDONALD: Okay. Well, just for the
24 record, our 30(a) count, count 2, only related to
25 actions taken in 2011. She hasn't reached that issue.

1 She may reach it in 90 days. That should set the
2 clock another 90 days. You heard evidence a year ago
3 about access problems. That's a substantive 30(a)
4 claim, and this process could go on and on and on.
5 And with all due respect to the parties involved,
6 that's the nature of the process.

7 THE COURT: Of course.

8 MR. MACDONALD: And she's declining primary
9 jurisdiction and so we're without a remedy as to the
10 access issue.

11 THE COURT: She's not declining primary
12 jurisdiction. She's saying I don't think you have a
13 cause of action; therefore, I don't think primary
14 cause of action is an issue. Right?

15 MR. BERWICK: That's accurate, yes.

16 THE COURT: She's saying I don't want to talk
17 about it. It's not an issue. There's no cause of
18 action from where I sit, said the Secretary, and by
19 the way, I'm going to rule on these. I've got SPAs.
20 I'm considering them. I'm going to make an
21 administrative judgment about it. You will get a
22 ruling. If you don't like it, there's a process for
23 dealing with it. If you do like it, you like it. You
24 can make an appeal, whatever.

25 I guess we've got to bring this to an end

1 before the Mayan calendar expires tomorrow.

2 MS. SMITH: I would just want to correct one
3 thing Attorney MacDonald just said, which is the
4 Secretary cannot at this point on the 2011 SPAs submit
5 additional requests for information to the state. The
6 clock is running. They can't reset it by sending new
7 requests for information at this point. We don't
8 believe the regulations allow them to do that.

9 MR. BERWICK: That's correct, your Honor.

10 THE COURT: But there's some trick about
11 withdrawing and modifying or something, isn't there?

12 MS. SMITH: I mean sometimes in the process
13 that has happened, but we don't know any reason why
14 it's going to now.

15 THE COURT: Well, what are your druthers? We
16 can go forward based upon the evidence taken
17 previously on a preliminary injunction basis. Maybe
18 that's the more efficient way to go.

19 Do you want to address the 13(A) claim with
20 respect to 2008-2010?

21 MR. O'CONNELL: We would like to, your Honor,
22 based on what you have raised here, and I think we're
23 prepared to go forward on the basis of the record
24 established.

25 THE COURT: We pretty much hit it all, didn't

1 we?

2 MR. O'CONNELL: We did.

3 THE COURT: Is that satisfactory to you,
4 Attorney Smith?

5 MS. SMITH: I'm sorry?

6 THE COURT: Well, we spent a lot of time on
7 the preliminary injunction hearing -- evidentiary
8 hearing. I'm thinking -- I'm trying to see my way
9 clear of resolving the case without having to have a
10 continued hearing on the merits. I don't personally
11 think we need more evidence, but you're entitled to
12 present it, obviously.

13 So I'm suggesting maybe you want to brief the
14 evolved 13(A) claim with respect to the 2008-2010
15 rates. It ought to be straightforward. I mean, I
16 suppose question number one is were you required to
17 give public notice, and I guess that turns on was
18 there a material change and so forth and so on. And I
19 suppose question two after that would be did you give
20 final notice. The answer is probably no. And then
21 the important question is, all right, what's an
22 appropriate remedy? What's an appropriate remedy?
23 What's the limit on the appropriate remedy? I assume
24 the state will argue the limit on the remedy is
25 injunction to provide notice and that's the way it

1 goes, and then your, I guess, argument is enjoin
2 enforcement of those rates until they get approval,
3 right?

4 MR. O'CONNELL: Yes.

5 MR. MACDONALD: Yes.

6 THE COURT: And their argument is going to be
7 we got approval. We didn't need approval. Your
8 argument is going to be, yes, you did; no you didn't.

9 MR. CHAPMAN: I would only add I don't think
10 this is inconsistent with what Attorney O'Connell
11 said, and that is although CMS weighed in and said
12 November 2010 was the effective notice, that's not our
13 position. Our position is that effective notice
14 wasn't given until you issued the injunction and that
15 would be March 30, 2012.

16 THE COURT: I'm not sure why it makes a
17 difference. Oh, I'm sorry. Of course. But I
18 think -- again, I think you've got a problem there. I
19 think CMS has approved those rates as of November
20 2010. Therefore, you have approved rate reductions as
21 of November 2010. Yes, but she was wrong. Well, take
22 that up with her. File an Administrative Procedure
23 Act appeal, do whatever, but that's within the
24 Secretary's bailiwick. I don't review that.

25 That the Secretary miscalculated the factors,

1 stressed one instead of another, failed to give
2 consideration of a third, not within my bailiwick.

3 MR. CHAPMAN: With all due respect, your
4 Honor, as I read their position it turned on notice.
5 It said we had submitted papers to them saying that
6 the earliest notice could be March --

7 THE COURT: I think you're focused on notice
8 and I'm focused on rates. Are they charging an
9 approved rate as of November 2010? Answer: They are.
10 You say, yes, but she's wrong because she was too
11 generous in terms of finding the notice back to 2010.
12 She may well have been, but has she approved rates as
13 of 2010 November? She has. That's a different
14 problem. Do you see what I mean?

15 MR. CHAPMAN: I see what you mean, but it's
16 inconsistent with law if the notice that she's relying
17 on --

18 THE COURT: We don't fly spec the Secretary
19 when she administers and enforces the Medicaid system.
20 That's the whole point of there's no private cause of
21 action to enforce 30(A) rights. You have no private
22 cause of action and the Secretary would be correct.
23 You don't. You have a right to vote with your feet
24 and not play if you don't like the way she's
25 administering it.

1 You've got this very, very narrow supremacy
2 clause window, very narrow. And that she got the
3 notice thing wrong in terms of construing her own
4 regulations, chevron deference and all of that, she
5 gets that. The Secretary gets that chevron deference.
6 She's made an administrative decision that those rates
7 are acceptable under the federal system as of November
8 2010, and we don't second-guess that. We don't have
9 to agree with it, but we don't get to second-guess it.

10 So all you're talking about now is do they
11 have approved rate reductions from November 2008 to
12 2010? Well, that's kind of up for grabs, I guess.
13 The state says, yes, we do. You say, no, we don't.
14 The Secretary says, I don't know, nobody has asked me
15 and I don't have the ability to go back and look, but
16 if there was no notice we don't have any problem with
17 an injunction.

18 But I suspect the Secretary would have a real
19 problem with the Court saying, well, let's look into
20 the substance of were the 30(a) factors adequately
21 taken into account, I think, right? The Secretary's
22 view on that was, no, 30(a) analysis is what I do;
23 there's no private right of action to enforce 30(a);
24 30(a) is what we do and 30(a) is not what you do.

25 MR. BERWICK: Well, the Secretary has not

1 said that she has primary jurisdiction of this 30(a)
2 question.

3 THE COURT: Yeah, I don't know why she's so
4 skittish about that. What's the problem? What's
5 the -- is there some legal political theory there?

6 MR. BERWICK: Well, I think the problem, your
7 Honor, is that the Secretary believes that there is no
8 cause of action under 30(a).

9 THE COURT: No, I understand that. But if I
10 was Secretary why am I telling everybody, listen,
11 that's my thing, primary jurisdiction right here, I'll
12 handle it, don't need any help, thank you?

13 MR. BERWICK: I don't think I can speak to
14 the Secretary's motivations in that regard, your
15 Honor, but what I will say is we're just not taking a
16 position on --

17 THE COURT: Yeah, it seems like -- I mean,
18 who cares. It doesn't matter. But it seems like it's
19 self-defeating. If you're the Secretary you want to
20 have all of the administrative authority that you can
21 get, right, and you don't want Courts around the
22 country in 90 different districts deciding 30(A)
23 issues in 90 different ways.

24 MR. BERWICK: And we think that's addressed,
25 your Honor, but I think that's under the supremacy

1 clause, which I know your Honor disagrees with.

2 THE COURT: Yeah, of course I do. Omitting a
3 narrow situation. The State can't pass laws contrary
4 to federal laws. That's pretty basic. You can't do
5 it. It's not a question of primary jurisdiction or
6 cause of action. It's a question of the supremacy
7 clause. Federal law controls. That's the way it is.

8 MS. SMITH: Your Honor, have we decided on
9 the briefings?

10 THE COURT: Yes. Well, if you agree. Do you
11 agree that you want to do it that way? I would ask
12 the plaintiffs to basically file a brief and a
13 proposed preliminary injunction order that basically
14 justifies the order that they propose, and why don't
15 you respond and tell me why I shouldn't or cannot
16 enjoin you in any way.

17 I think we're down to the 2008-2010
18 reductions. I think the case is down to that. It is
19 down to that.

20 MS. SMITH: So I'm understanding, we're going
21 to submit affidavits and we're not contemplating an
22 evidentiary hearing?

23 THE COURT: I was not. You're entitled to it
24 if you want it. I just don't see that it would add
25 anything. I mean, who else would testify and what

1 else would they say? Is there something unique about
2 that period? I mean it's -- we know why they did it.
3 They did it because they were saving money. That's
4 why they did it. The Secretary has said, yes, that's
5 probably why they did it but we don't care as long as
6 it meets federal standards, and it does.

7 So the only question now is the 13(A) issue.
8 Was there notice required? Did you give it? If
9 not -- if you were required and you didn't give it,
10 what's the appropriate remedy? Or more to the point,
11 is some remedy other than go ahead and provide
12 notice -- worthless as that is at this point in time,
13 is there some other remedy that's available? For
14 example, are they going to say enjoin the settlement
15 process until such time as they have an opportunity to
16 bring a contract action in state court where they can
17 award damages, or something to that effect, I gather,
18 or an order asking me to enjoin you from enforcing
19 those rates until you get approval because approval
20 was required and you didn't get it?

21 That troubles me, I might add, because that's
22 starting to stray into the 30(a) analysis.

23 MR. O'CONNELL: Understood. Your Honor, may
24 we have -- we would propose to have until Friday,
25 January 11th, to file.

1 THE COURT: Sure.

2 MR. O'CONNELL: Thank you very much.

3 THE COURT: And what do you need, Nancy?

4 MS. SMITH: I'm sorry. I couldn't hear.

5 THE COURT: Friday, January 11th, for him.

6 What would you like? He's going to do Friday, January
7 11th.

8 MS. SMITH: For them to file their response?

9 THE COURT: No. They're going to give me a
10 brief and a proposed injunction order.

11 MS. SMITH: We would need at least -- can we
12 have twenty days?

13 THE COURT: Sure. Is January 11th too tough
14 for you? It is the holidays.

15 MR. O'CONNELL: It is the holidays. We're
16 trying to move it along. If we got another week, that
17 would be helpful, your Honor.

18 THE COURT: Why don't you do the 18th.

19 Ms. Smith, is the 8th all right or is that --
20 or how about make it easy. How about the 15th of
21 February?

22 MS. SMITH: The 15th of February. Thank you.

23 THE COURT: Okay. And let's see if we can
24 resolve it on that basis.

25 Okay. Thank you, Mr. Berwick. I appreciate

1 your contribution and your help, and welcome.

2 Thank you, gentlemen, ladies. I appreciate
3 it.

4 MR. BERWICK: Thank you, your Honor.

5 MR. O'CONNELL: Thank you, your Honor.

6 (Conclusion of hearing at 3:50 p.m.)

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1 C E R T I F I C A T E

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4 I, Susan M. Bateman, do hereby certify that the
5 foregoing transcript is a true and accurate
6 transcription of the within proceedings, to the best of
7 my knowledge, skill, ability and belief.

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Submitted: 1-11-13

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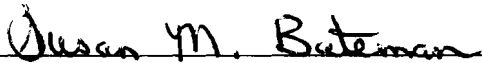
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